ZULKIFLI MUHAMMAD HANAFIAH v. SURUHANJAYA PERKHIDMATAN PELAJARAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[JUDICIAL REVIEW NO: 25-258-09-2015]
22 SEPTEMBER 2016

CIVIL PROCEDURE: *Judicial review – Certiorari – Application to quash decision of terminating applicant's service – Applicant initially convicted for criminal offence – Applicant suspended from work and did not receive salary and allowance – Applicant resumed duty after being discharged not amounting to acquittal upon appeal against conviction – Employer issued show cause letter, demanding explanation for absence – Applicant's explanation on suspension not accepted – Applicant terminated from service – Whether applicant absent from work or suspended from duty – Whether termination lawful*

PUBLIC SERVANTS: *Dismissal – Procedure – Officer absent from duty – Whether actual attempt made to enquire into whereabouts of absent officer – Whether mandatory procedure complied with – Public Officers (Conduct and Discipline) Regulations 1993, reg. 29(1)*

The applicant, a school teacher, was initially found guilty under s. 417 of the Penal Code and was sentenced to six months imprisonment. Upon learning about the applicant's conviction, the principal of the school where the applicant was working (i) told the applicant not to come to work as he was being suspended; (ii) instructed the Unit Gaji, Kementerian Pelajaran Malaysia to stop the payment of the applicant's salary and allowance; and (iii) wrote a letter to Lembaga Tatatertib Perkhidmatan Pendidikan, recommending the suspension or termination of the applicant's service for being absent without permission. Meanwhile, the applicant was successful in the appeal against his conviction; he was discharged not amounting to acquittal. The applicant informed the new principal of the same school of the latest outcome of his conviction. Consequently, the school told the applicant to come back to work immediately. The applicant resumed his duty but a show cause letter was later issued by the school, demanding an explanation as to why he was absent from duty from 2005 until 2009. The applicant explained about his suspension during the said period. He received a notice from the Ministry of Education ('the second respondent') for being absent from work without permission and the respondents gave him 21 days to submit his defence which he did. However, the applicant's explanation was not accepted by the second respondent and he was terminated from service. In the present judicial review application, the applicant sought an order of *certiorari* to quash the decision of the respondents.

Held (allowing application):

(1) The respondents erred in fact in ruling that the applicant was terminated from service on the ground that he was absent from work. Evidence showed that the principal had sent a letter to the Unit Gaji, Kementerian Pelajaran Malaysia to stop the applicant's payroll. Even though there was no formal letter to show the applicant's suspension, he did not receive any salary and allowance since April 2005. The irresistible conclusion that could be drawn was that the applicant was not absent from work but he was suspended from duty. Furthermore, the respondents had instructed the applicant to start his duty immediately at the school but no explanation was given as to why the applicant was asked to start work. (paras 29-34)

(2) If an officer is absent from duty, the respondent will first have to comply with the procedure under reg. 29(1) of the Public Officers (Conduct and Discipline) Regulations 1993. However, the respondents failed to fulfil the procedural requirement which is mandatory in nature. Any non-compliance would result in the action taken being declared null and void or quashed as no actual attempt was made to enquire into the whereabouts of the absent officer. (paras 35 & 36)

Case(s) referred to:

Ketua Pengarah Jabatan Hasil Dalam Negeri & Anor v. Aria Kumar & Anor [1995] 3 CLJ 507 CA ***(refd)***

Legislation referred to:

Education Service Disciplinary Board Regulations 1994, regs. 13, 14(1)
Penal Code, s. 417
Public Officers (Conduct and Discipline) Regulations 1993, regs. 29(1), 37, 38

For the applicant - Mohamed Ibrahim Mohamad; M/s Ibrahim & Fuaadah
For the respondent - Natra Idris; SFC

Reported by Najib Tamby

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] The applicant filed a judicial review application against the decision of the respondents.

[2] In gist the applicant sought an order of *certiorari* to quash the decision of the Chairman of the Disciplinary Board of Education Service for the Support Group (no. 1), Ministry of Education Malaysia dated 16 January 2014 (i) to forfeit emoluments for the period of applicant's absence from work; and (ii) to dismiss the applicant from the public service effective from

27 December 2013 and subsequent to that against the decision made by the respondent in affirming the Disciplinary Board's decision and dismissed the applicant's appeal.

The Background Facts

[3] The relevant background facts are as follows.

[4] The applicant was a teacher and was teaching at Sekolah Kebangsaan La Salle (2) Brickfields, Kuala Lumpur ("the said school").

[5] On 22 April 2005, the applicant was found guilty under s. 417 of the Penal Code and was sentenced for imprisonment of six months and the applicant appealed against the decision.

[6] On 23 April 2005 (Saturday), the principal of the school where the applicant worked, Encik Sopian Bin Haji Mokhtar ("the said principal"), found out about his conviction *vide* newspaper and thereafter contacted the applicant and informed him not to come to work since the suspension of the applicant would take effect immediately upon his conviction.

[7] Three days later (26 April 2005), the principal wrote a letter to Unit Gaji, Kementerian Pelajaran Malaysia and instructed them to stop the payment of applicant's salary and allowance.

[8] It is not a disputed fact that the applicant did not receive any salary since April 2005.

[9] On 28 July 2006 the applicant's appeal against the conviction was allowed and the re-trial was ordered by the High Court.

[10] On 17 September 2007, the same principal again wrote another letter to Lembaga Tatatertib Perkhidmatan Pendidikan recommending for the suspension or termination of service of the applicant for absenting without leave/without permission.

[11] On 7 September 2009, the applicant was discharged not amounting to acquittal by the court and on 9 October 2009 the court sent a letter confirming the same to the respondents.

[12] On 9 October 2009, the applicant had directly contacted the principal of the said school which at that time is Encik Sarjit Singh a/l Sarban Singh, informing him the latest outcome of his conviction.

[13] Consequently on 29 October 2009, the said school sent a letter to the applicant to come back to work with immediate effect which the applicant received the letter on 12 November 2009 and he has been started his duty on 16 November 2009.

[14] However, later a show cause letter was given by the said school to the applicant for him to explain why he has absent from his duty from 25 April 2005 until 13 November 2009.

[15] The applicant replied that he was suspended since 25 April 2005 until 13 November 2009 and therefore he cannot come to work. In support of this contention, the applicant relied on the following facts:

(i) He did not receive any salary or allowance since April 2005;

(ii) A direct instruction given by the principal to him which is the higher authority at the said school; and

(iii) There was no warning letter given to him in that four years he did not come to work to show that he was absent without leave.

[16] Later, the applicant received a notice from the Kementerian Pendidikan Malaysia dated 26 September 2013 on disciplinary action under "Peraturan 37, Peraturan-Peraturan Pegawai Awam (Kelakuan & Tatatertib) 1993" for absenting from work without leave from 25 April 2005 until 13 November 2009 and the respondents gave 21 days for him to submit his defence which he did on 21 October 2013.

[17] However this explanation was not accepted by the second respondent, Kementerian Pendidikan Malaysia and he was terminated from the services with effect from 27 December 2013 *vide* a letter 16 January 2014 and the applicant had appealed on 24 February 2014 to the first respondent.

[18] At the meantime, the applicant was acquitted from all criminal charges against him on 27 July 2012.

[19] Finally his appeal against the termination of service was dismissed by Suruhanjaya Perkhidmatan Pelajaran on 7 April 2015 which he received on 16 June 2015.

Issue

[20] The main issue to be determined by this court is whether it is lawful to terminate the applicant for being absent from work from 25 April 2005 until 13 November 2009.

The Charge

[21] A show cause letter dated 26 September 2013 was issued to the applicant (exh. "MM-1" of the respondent's affidavit (No. 1)), informing him that the Disciplinary Authority intended to pursue disciplinary action against him under reg. 37 of the 1993 Regulations for the following charge:

> PERTUDUHAN
>
> Bahawa tuan, Zulkifli bin Muhammad Hanafiah (No. K/P: 760415-01-5573), Pegawai Perkhidmatan Pendidikan Lepasan Diploma Gred DGA29 semasa bertugas di Sekolah Kebangsaan La Salle (2) Brickfields, W.P Kuala Lumpur didapati telah tidak hadir bertugas tanpa cuti atau tanpa terlebih dahulu mendapat kebenaran Ketua Jabatan atau tanpa sebab yang munasabah pada tarikh-tarikh berikut:

Tahun 2005

Bulan Tarikh

April : 25, 26, 27, 28 dan 29

Mulai 1.5.2005 hingga 31.12.2005

Tahun 2006

Mulai 1.1.2006 hingga 31.12.2006

Tahun 2007

Mulai 1.1.2007 hingga 31.12.2007

Tahun 2008

Mulai 1.1.2008 hingga 31.12.2008

Tahun 2009

Mulai 1.1.2009 hingga 31.10.2009

Bulan Tarikh

November: 02, 03, 04, 05, 06, 10, 11, 12 dan 13

Perbuatan tersebut membolehkan tuan dikenakan tindakan tatatertib selaras dengan Peraturan 24, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 dan ditafsirkan sebagai tidak bertanggungjawab iaitu melanggar tatakelakuan di bawah Peraturan 4(2)(g), Peraturan-Peraturan yang sama seperti berikut:

4(2) Seseorang pegawai tidak boleh:

(g) tidak bertanggungjawab.

[22] The said show cause letter clearly stated that the applicant could be punished under reg. 38 of the 1993 Regulations once found guilty and he was given 21 days from the receipt of the said letter to furnish his written representation to exculpate himself from the charge.

[23] By a letter dated 21 October 2013 the applicant made his representation against the show cause letter.

[24] *Vide* a letter dated 16 January 2014, the applicant had been informed that the Chairman of the Disciplinary Board in a meeting held on 27 December 2013 had carefully considered the charge and representation made by the applicant and found that his representation did not exculpate himself and decided that the applicant was guilty and imposed the punishments of forfeiture of emoluments and dismissal effective from 27 December 2013.

[25] The same letter also stated that the applicant was given an opportunity to appeal to the Disciplinary Appeal Board within 14 days from the receipt of the Disciplinary Board's decision under regs. 13 and 14(1) of the Education Service Disciplinary Board Regulations 1994 (P.U.(A) 458/1994).

[26] The applicant had furnished his letter of appeal dated 24 February 2014.

[27] By a letter dated 7 April 2015, the applicant was informed that the respondent in the meeting held on 31 March 2015, after considering the appeal, had decided that there is no strong basis in the applicant's appeal and thus the respondent dismissed the applicant's appeal.

Decision

[28] The applicant submitted that it is unlawful to terminate on the ground of absence without leave when actually the applicant was suspended from his duty. The applicant had acted based on the instruction given by his superior authority which is the said principal of the school.

[29] Even though there is no formal letter to show that the applicant was suspended but it is not disputed that his salary and allowances was suspended and therefore the irresistible conclusion to be drawn is that the applicant was suspended at the material time. The evidence shows that the principal had sent a letter to Unit Gaji Kementerian Pelajaran Malaysia to stop the applicant's payroll, and therefore the applicant did not receive any salary and allowance since April 2005.

[30] It is pertinent to note that, in para. 5.5 of the respondent's affidavit in reply, the principal affirmed as follows:

> Pada 26.4.2005, saya telah menghantar surat kepada Unit Gaji, Kementerian Pelajaran Malaysia untuk memohon memberhentikan gaji dan elaun dari payroll Pemohon untuk bulan Mei 2005 kerana keputusan Mahkamah dalam kes jenayah tersebut.

[31] Further, *via* a letter dated 29 October 2009, the respondent had instructed the applicant to start his duty immediately at the said school and the applicant had started his duty on 16 November 2009.

[32] No explanation was given by the respondent why the headmaster had sent the letter dated 29 October 2009 asking the applicant to start work.

[33] Based on the above reasons, the respondent has erred in fact when the applicant was terminated from service on the ground that he was absent from work.

[34] Based on the affidavit evidence filed by the parties, it seems to me that the applicant was not 'absent from work, but he was 'suspended' from his duty on 25 April 2005 until 13 November 2009.

[35] It is pertinent to note, if an officer is absent from duty, the respondent will firstly have to comply with the procedure under reg. 29(1) of the Peraturan-Peraturan Pegawai Awam (Kelakuan & Tatatertib) 1993 which states that:

Prosedur dalam kes jika pegawai tidak hadir tanpa cuti dan tidak boleh dikesan:

(1) Walau apa pun peruntukan peraturan 52, jika seseorang pegawai tidak hadir tanpa cuti selama tujuh (7) hari berturut-turut dan tidak boleh dikesan, Ketua Jabatan itu hendaklah menyebabkan suatu surat dihantar kepada pegawai itu melalui Pos Berdaftar Akuan Terima ke alamatnya yang akhir yang diketahui sebagaimana yang diberikan kepada Ketua Jabatan di bawah peraturan 52, mengarahkan pegawai itu melaporkan diri untuk bertugas dengan serta merta.

(2) Jika selepas surat itu telah diserahkan:

(a) Pegawai itu melaporkan diri untuk bertugas; atau

(b) Pegawai itu tidak melaporkan diri untuk bertugas atau tiada apa-apa jua khabar didengar daripadanya

Ketua Jabatan hendaklah mengemukakan suatu laporan kepada Pihak Berkuasa Tatatertib yang berkenaan dan Pihak Berkuasa Tatatertib yang berkenaan dan Pihak Berkuasa Tatatertib itu hendaklah memulakan tindakan tatatertib mengikut Peraturan-Peraturan ini.

[36] It must be emphasised that at the material time, the respondents had failed to fulfil the requirement stated above the procedural requirement which are mandatory in nature. Any non-compliance therewith may result in the action taken being declared null and void or quashed as no actual attempt was made to enquire into the whereabouts of the absent officer. In the case of *Ketua Pengarah Jabatan Hasil Dalam Negeri & Anor v. Aria Kumar & Anor* [1995] 3 CLJ 507; [1995] 2 MLJ 533, the Court of Appeal held that an actual attempt must be made to trace the whereabouts of the officer first before any resort could be had to sending the A.R. registered letter. The word 'trace' connotes a positive act on the part of the relevant disciplinary authority.

[37] I accept the applicant's contention that the evidence shows that the respondents had failed to comply with the procedure under reg. 29(1) Peraturan-Peraturan Pegawai Awam (Kelakuan & Tatatertib) 1993. The facts shows that the principal was aware of the reason why the applicant was absent and he knows the last known address of the applicant by referring to the letter dated 7 May 2010, letter dated 21 October 2013 and 'cabutan daftar alamat' from Jabatan Pendaftaran Malaysia dated 6 April 2007.

Conclusion

[38] Based on the above reasons, the applicant's application is allowed with costs of RM10,000.